

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----x  
RAFAEL TEJEDA and TRINNY TEJEDA,

Plaintiffs,

Civil Action No.

-against-

**COMPLAINT**

THE UNITED STATES OF AMERICA,  
Defendant.

-----x

Plaintiffs, RAFAEL TEJEDA and TRINNY TEJEDA, by their  
attorneys WEISFUSE & WEISFUSE, LLP, complaining of defendant THE  
UNITED STATES AMERICA, state:

**JURISDICTION, VENUE, AND PARTIES**

1. This action is properly commenced pursuant to the Federal Tort Claims Act, sections 1346(b) and 2671-2680, title 28, United States Code.
2. Venue in this Court is proper in that plaintiffs reside at 1528 Leland Ave., 2B, Bronx, New York.
3. On December 6, 2016 plaintiffs duly served their claim ("the Claim") upon the Department of Veterans Affairs, Office of Regional ("VA"), alleging that surgeons employed by the VA at the Bruce W. Carter VA Medical Center ("Medical Center") committed medical malpractice in performing a right total hip replacement ("THR") on

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Rafael Tejeda ("Tejeda"), which caused Tejeda to suffer a significant leg length discrepancy, pain, severe limp, inability to perform his work as a waiter, muscle wasting, impaired gait, degeneration of his lumbar spine, abductor muscle weakness, severe depression, and the need for revision surgery.

4. At the time of the malpractice claimed herein, Tejeda was married to Trinny Tejeda.
5. The Claim included a claim for damages on behalf of Trinny Tejeda based on her loss of her husband's services and consortium.
6. Receipt of the Claim was acknowledged on December 12, 2016.
7. On June 2, 2017 the Claim was denied by VA.
8. This action is commenced in a timely manner pursuant to 28 USC §2401.

#### **FIRST CLAIM**

9. At all times herein stated, Tejeda was a veteran, honorably discharged from the armed forces of the United States.
10. On January 22, 2015 Tejeda had THR performed at the Medical Center.

11. At all times herein stated, the Medical Center was owned, operated, and controlled by the United States of America.

12. The THR was performed by Henry M. Bernstein, MD ("Bernstein").

13. At all times herein stated Bernstein was an orthopedic surgeon, who was employed by the VA, and performed the THR in the course of his employment with the VA.

14. Andrew Hiller, MD ("Hiller") assisted Bernstein in performing the THR.

15. At all times herein stated Hiller was an orthopedic surgeon, who was employed by the VA, and participated in the THR in the course of his employment with the VA.

16. Bernstein, Hiller, and the VA were negligent and deviated from standard and proper surgical practice in performing the THR; in causing the right leg to be overlengthened; in causing an unacceptable leg length discrepancy; in failing to perform proper tests to insure that the right leg is the proper length; in placing the femoral prosthesis too high; in causing the right leg to become too long; in causing the femoral neck to be cut too high, which prevented the femoral prosthesis from being inserted properly into the femur at the right height; in causing unacceptable lengthening of the right leg.

17. As result of malpractice in performing THR, Tejeda's right leg was significantly longer than his left by 1.5-2cm, which is unacceptable. He developed pain, stiffness over his anterior thigh and weakness with hip flexion. His ability to walk was severely limited. His right leg dragged. He required crutches. He ambulated with Trendelenburg gait. This caused him to suffer low back pain. He was disabled from his employment as a waiter, and was unable to fully engage in activities of daily living, suffers severe psychological depression, and other serious permanent injuries.

18. On February 18, 2016 Tejeda presented to VA New York Harbor Healthcare System ("HHS"), where he was seen by Ajit Deshmukh, MD. He complained of persistent pain and limp. It was noted that he had severe right sided limp, and was using a crutch. His right leg was 2cm longer than his left. There was right sided wasting of the thigh, severe pain on hip range of motion; rotation of the right hip was extremely painful; right abductor was weak and painful; there was groin pain going down anterior right thigh.

19. MRI done on November 17, 2015 showed straightening of the lumbar spine with multilevel degenerative change.

20. On May 4, 2016 Tejeda presented to HHS, where he received an injection of corticosteroid in his right hip/greater trochanter region to treat his hip pain. It was noted that he had increasing low back pain, buttock pain, as well as radiating right leg pain, groin pain, and pain in his lateral hip. On x-ray it was noted that his right leg was 2cm longer than his left, and it was concluded that the likely cause of lumbar spine disease was the 2cm leg length discrepancy. It was noted that he walks with classic Trendelenburg gait, and there was wasting of the right abductor muscles.
21. On June 11, 2016 Tejeda presented to HHS with complaints of lumbar radiculopathy and right hip weakness, and saw Dr. Fang. Electrodiagnostic study showed: right lower lumbosacral radiculopathy, and denervation of right superior gluteal nerve branch at/around the surgical site of the THR.
22. On September 8, 2016 Tejeda presented to Alejandro Leali, MD, an orthopedic surgeon at Hospital for Special Surgery for an orthopedic examination. His leg length discrepancy was measured at 1.5cm; his perceived leg length discrepancy was 2 cm. On x ray it was shown: s/p THR with 1.5 measured elongation of right leg. He was diagnosed as failed THR.

23. By reason of the foregoing, Tejeda suffers severe pain and disability from leg length discrepancy, and associated right quadriceps weakness and pain, and greater trochanteric bursitis, markedly impaired gait, with resulting back pain and degeneration of his lumbar spine; he is disabled from work, significantly limited in his activities of daily living, and suffers loss of quality of life, severe emotional distress, and requires revision surgery.

24. By reason of the foregoing, plaintiff Tejeda claims damages in the sum of ten million dollars (\$10,000,000).

#### **SECOND CLAIM**

25. Plaintiffs reallege each and every allegation in the First Claim as if fully set forth a length herein.

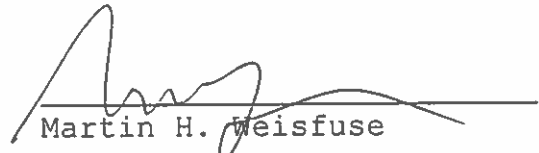
26. At all times herein stated Tejeda and Trinny Tejeda were and are husband and wife, and reside together in the same household.

27. By reason of the foregoing, plaintiff Trinny Tejeda lost the services and consortium of her husband.

28. By reason of the foregoing, plaintiff Trinny Tejeda claims damages in the sum of one million dollars (\$1,000,000).

WHEREFORE, plaintiffs demand judgment against United States in the sum of TEN MILLION (\$10,000,000) DOLLARS on the First Claim, and ONE MILLION (\$1,000,000) DOLLARS on the Second Claim, together with interest, costs, and disbursements.

Dated: New York, New York  
June 22, 2017



Martin H. Weisfuse  
WEISFUSE & WEISFUSE, LLP  
Attorneys for Plaintiff  
420 Lexington Ave.-Suite 2328  
New York, New York 10170  
(212) 983-3000

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----x  
RAFAEL TEJEDA and TRINNY TEJEDA,

Plaintiffs,

Civil Action No.

-against-

**CERTIFICATE OF  
MERIT FOR MEDICAL  
MALPRACTICE ACTION**

THE UNITED STATES OF AMERICA,  
Defendant.

-----x  
The undersigned, attorney for Plaintiffs, declares that,

(Check the appropriate box)


X  I have reviewed the facts of the case and have consulted with at least one physician who is licensed to practice in this state or any other state and who I reasonably believe is knowledgeable in the relevant issues involved in this action, and I have concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of this action.

I was unable to obtain the consultation required by CPLR 3102 - a(a)(1) because a limitation of time established by CPLR Article 2 would bar the action, and the certificate required by CPLR 3102-a(a)(1) could not reasonably be obtained before such time expired. The certificate required shall be filed within ninety days after service of the complaint.

I was unable to obtain the consultation required by CPLR 3102-a(a)(1) because I have made three separate good faith attempts with three separate physicians or dentists to obtain such consultation and none of those contacted would agree to such a consultation.

I intend to rely solely on the doctrine of "res ipsa loquitur" and for that reason am not filing the certificate required by CPLR 3102-a(a)(1).

Dated: New York, New York  
June 22, 2017

  
MARTIN H. WEISFUSE  
WEISFUSE & WEISFUSE, LLP  
Attorneys for Plaintiff  
420 Lexington-Suite 2328  
New York, New York 10170  
(212) 983-3000

**AFFIDAVIT OF ANDREW J. COLLIER, JR. MD**

STATE OF NEW JERSEY     )  
  )  
COUNTY OF BERLINGTON)

Andrew Collier, Jr. MD, being duly sworn, deposes and says: I am a physician licensed to practice medicine in the State of PA and NJ and am a Board Certified Orthopedic Surgeon. My CV is annexed. I have reviewed the medical records and radiology films pertaining to the claim of Rafael Tejada.

On January 22, 2015 Rafael Tejada ("Tejada"), age 50, had a right total hip replacement surgery ("THR") performed at the Veteran's Administration ("VA") Hospital in Miami, Florida. Henry M. Bernstein, MD was listed as the attending orthopedic surgeon; Andrew Hiller, MD was listed as the surgeon. The indication for the THR was stated to be painfully disabling avascular necrosis of both hips; the right was more painful. The prosthesis installed included a Smith and Nephew acetabular shell, model no. 71335554 coated shell; lot no.: 14LM06622; size: 54mm; spherical head cancellous screw (model no. 71332525); Smith and Nephew femoral component (model no. 71306616; lot no.: 14KM00353; size: 16); Smith and Nephew acetabular cup liner (model: 71332754; lot no.: 14M15946; size: 54mm); Smith and Nephew femoral head (model: 7134300; lot no.:14LM15946; size:+0) (Exhibit "A").

Tejada's right leg was left significantly longer than his left by 1.5-2cm. This is unacceptable. He developed pain and stiffness over his anterior thigh and weakness with hip flexion. His ability to walk was severely limited. His right leg was dragging. He required crutches. He ambulated with a Trendelenburg gait. This caused him to suffer low back pain. He was disabled from his employment as a waiter, and was unable to fully engage in activities of daily living.

On February 18, 2016 Tejeda presented to VA New York Harbor Healthcare System ("HHS") in Manhattan, where he was seen by Ajit Deshmukh, MD. He complained of persistent pain and a limp. It was noted that he had a severe right sided limp, and was using a crutch. His right leg was 2cm longer than his left. There was right sided wasting of the thigh, severe pain on hip range of motion; rotation of the right hip was extremely painful; tender to palpation; TTP over Greater Trochanter and abductor insertion-severe; the right abductors were weak and painful; there was groin pain going down anterior right thigh (Exhibit "B"). An MRI done on November 17, 2015 showed straightening of the lumbar spine with multilevel degenerative changes (Exhibit "C").

On May 4, 2016 he presented to HHS, under the care of Dr. Deshmukh, where he received an injection of corticosteroid in his right hip/greater trochanter region to treat his hip pain. It was noted that he had increasing low back pain, buttock pain, as well as radiating right leg pain, groin pain, and pain in his lateral hip. On x-ray it was noted that his right leg was 2cm longer than his left, and that the likely cause of his lumbar spine pain was the 2cm leg length discrepancy. It was noted that he walks with classic Trendelenburg gait, and there was wasting of the right abductor muscles (Exhibit "D").

On June 11, 2016 Tejeda presented to HHS with complaints of lumbar radiculopathy and right hip weakness. There he saw Dr. Fang. Electrodiagnostic studies showed: right lower lumbosacral radiculopathy, and denervation of right superior gluteal nerve branch at/around the surgical site of the THR. (Exhibit "E")

On September 8, 2016 he presented to Alejandro Leali, MD, an orthopedic surgeon at the Hospital for Special Surgery for an orthopedic examination. It was determined that his gait reflects limb length discrepancy; his leg length discrepancy was measured at 1.5cm; his

perceived leg length discrepancy was 2 cm. On x ray it was shown: s/p THR with 1.5cm measured elongation of right leg. He was diagnosed with a failed THR, associated right quadriceps weakness and pain, as well as greater trochanteric bursitis. Both Dr. Leali and Dr. Deshmukh agree that he requires revision surgery (Exhibit "F").

It is my opinion with a reasonable degree of medical certainty that the VA deviated from standard and proper surgical practice in performing the THR; in causing the right leg to be overlengthened; in causing an unacceptable leg length discrepancy; in failing to perform proper tests to insure that the right leg is the proper length; in placing the femoral prosthesis too high, causing the right leg to be too long; in causing the femoral neck to be cut too high, which prevented the femoral prosthesis from being inserted properly into the femur at the right height; in causing unacceptable lengthening of the right leg.

As result Tejeda suffers severe leg length discrepancy, will require revision surgery, suffers severe pain, and weakness in the right hip and back, lumbosacral radiculopathy, weak and painful right abductor muscles, has an impaired gait, requires crutches, suffers impairment in activities of daily living, and cannot work as a waiter or in any capacity which requires significant walking, bending, or heavy lifting.

  
ANDREW J. COLLIER, JR. MD

Sworn to before me this

day of December, 2016

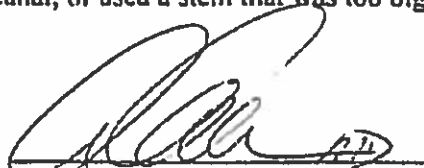
  
NOTARY PUBLIC

KATHLEEN A. COLLIER  
NOTARY PUBLIC OF NEW JERSEY  
My Commission Expires 11/27/2018

**SUPPLEMENTAL AFFIDAVIT OF ANDREW J. COLLIER, JR. MD**

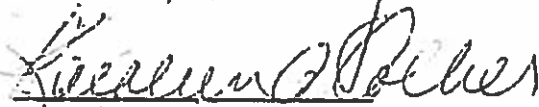
Andrew Collier, Jr. MD, being duly sworn, deposes and says: I am a physician licensed to practice medicine in the State of PA and a Board Certified Orthopedic surgeon.

I reviewed the post operative x-ray done of Rafael Tejeda's right hip, which was replaced. I saw that the stem of the right hip prosthesis was perched too high in the canal. This caused his right leg to be significantly longer than his left. The reason for this is either that the surgeon did not ream deep enough into the canal, or used a stem that was too big. Either is a deviation from standard of care.

  
ANDREW J. COLLIER, JR. MD

Sworn to before me this

26 day of February

  
NOTARY PUBLIC

KATHLEEN A. COLLIER  
NOTARY PUBLIC OF NEW JERSEY  
My Commission Expires 11/27/2018